Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 14-916

IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 29, 2015
CERTIORARI GRANTED JUNE 22, 2015

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DOCKET ENTRIES
NO. 12-173 (FED. CL.)*

Date Filed	#	Docket Text
03/15/2012	1	COMPLAINT against USA (VA) ... filed by KINGDOMWARE TECHNOLOGIES, INC. ...
		* * *
04/09/2012	6	MOTION to Dismiss pursuant to Rule 12(b)(1), filed by USA. ...
		* * *
06/04/2012	11	RESPONSE and reply to 6 MOTION to Dismiss pursuant to Rule 12(b)(1), filed by KINGDOMWARE TECHNOLOGIES, INC. ...
06/21/2012	12	REPLY to Response to Motion re 6 MOTION to Dismiss pursuant to Rule 12(b)(1), filed by USA.
07/18/2012	13	ORDER Plaintiff's Motion to File Amended Complaint granted. ...
08/01/2012	14	RESPONSE to 6 MOTION to Dismiss pursuant to Rule 12(b)(1), filed by KINGDOMWARE TECHNOLOGIES, INC. ...
		* * *
08/06/2012	16	REPLY to Response to Motion re 6 MOTION to Dismiss pursuant to Rule 12(b)(1), filed by USA.

* Entries edited for brevity and clarity.

* * *

08/21/2012	18	ORDER granting 6 Motion to Dismiss—Rule 12(b)(1) plaintiff's claims for prospective declaratory and injunctive relief. ...

* * *

09/04/2012	21	STIPULATION of Facts, filed by USA.
09/18/2012	22	MOTION for Summary Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC. ...
10/09/2012	23	CROSS MOTION and RESPONSE to 22 Motion for Summary Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC., filed by USA. ...

* * *

10/23/2012	28	RESPONSE and reply to 23 CROSS MOTION and RESPONSE to 22 Motion for Summary Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC., filed by KINGDOMWARE TECHNOLOGIES, INC. ... Modified on 10/25/2012—corrected response.
10/26/2012	29	REPLY to Response to Motion re 23 CROSS MOTION and RESPONSE to 22 Motion for Summary Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC., filed by USA.

* * *

11/27/2012	30	PUBLISHED OPINION denying 22

		Plaintiff's Motion; granting 23 Defendant's Cross-Motion. Joint Status Report due by 12/10/2012. ...
12/10/2012	31	JOINT STATUS REPORT, filed by USA.
12/12/2012	32	UNPUBLISHED OPINION and ORDER. For the reasons identified in the November 27, 2012 opinion (ECF No. 30), the Clerk of the Court is directed to enter judgment pursuant Rule 54(b) for defendant as to all three procurements identified in plaintiff's amended complaint. Each party to bear its own costs. ...
12/18/2012	33	JUDGMENT entered pursuant to Rule 58, that judgment is in favor of defendant as to all three pf the procurements identified in plaintiffs amended complaint. Each party shall bear its own costs. ...
01/10/2013	34	NOTICE OF APPEAL as to 33 Judgment, filed by KINGDOMWARE TECHNOLOGIES, INC. ...

* * *

DOCKET ENTRIES
NO. 2013-5042 (FED. CIR.)*

01/15/2013	1	Appeal docketed. ...
		* * *
09/04/2013	24	BRIEF FILED for Appellant Kingdomware Technologies, Inc. [23]. Title: Brief for Plaintiff-Appellant Kingdomware Technologies, Inc., [Non-Confidential version only]. ...
		* * *
11/22/2013	37	BRIEF FILED for Appellee US [36]. Title: Brief for Defendant-Appellee, The United States, [Non-Confidential version only]. ...
		* * *
12/20/2013	40	BRIEF FILED for Appellant Kingdomware Technologies, Inc. [39]. Title: Reply Brief for Plaintiff-Appellant Kingdomware Technologies, Inc., [Non-Confidential version only]. ...
		* * *
03/07/2014	48	Submitted after ORAL ARGUMENT by Lauren B. Fletcher for Kingdomware Technologies, Inc. and Mr. Robert C. Bigler for US. Panel: Judge: Prost , Judge: Clevenger , Judge: Reyna.

* Entries edited for brevity and clarity.

03/18/2014	49	Letter from Appellee US Veteran-owned small business contracting goals. ...
04/02/2014	50	Letter from Appellant Kingdomware Technologies, Inc. in response to March 18, 2014 letter from Appellee. ...
06/03/2014	51	OPINION and JUDGMENT filed. The judgment or decision is: Affirmed. (Precedential Opinion). (For the Court: Prost,Chief Judge; Clevenger,Circuit Judge and Reyna,Circuit Judge). Reyna, Circuit Judge, dissenting.

* * *

07/18/2014	53	Petition for en banc rehearing filed by Appellant Kingdomware Technologies, Inc. ...

* * *

08/05/2014	61	RESPONSE of Appellee US to the petition for en banc rehearing [53] filed by Appellant Kingdomware Technologies, Inc. in 13-5042. ...

* * *

09/10/2014	66	ORDER filed denying [53] petition for en banc rehearing filed by Kingdomware Technologies, Inc.. By: En Banc (Per Curiam). ...
09/17/2014	67	Mandate issued to the United States Court of Federal Claims. ...

* * *

NOTICE FROM JAN R. FRYE TO ALL VA ACQUISITION AND PROCUREMENT OFFICIALS/PERSONNEL

October 17, 2011

TO: All VA Acquisition and Procurement Officials/Personnel

SUBJ: Recent Government Accountability Office Decision Involving the Use of the Federal Supply Schedule Program vs. VA's Veterans First Contracting Program

1. On January 7, 2010, VA implemented those portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Sections 502 and 503 of Public Law 109-461 (the Act) providing opportunities for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) to increase their federal contracting and subcontracting (74 Federal Register 64619 (December 8, 2009)). Under this final rule, commonly referred to in VA as the "Veterans First Contracting Program," a VA contracting officer may restrict competition to contracting with SDVOSBs or VOSBs under certain conditions. Likewise, sole source contracts with SDVOSBs or VOSBs are permissible under certain conditions. This final rule implemented these special acquisition methods as a change to the VA Acquisition Regulation (VAAR). Therein, in response to public comments and to a comment from the General Services Administration as to the applicability of the VA's new SDVOSB/VOSB set-aside program to acquisitions conducted pursuant to the Federal Supply Schedule, VA responded that the law and VA's implementing regulations do not apply to FSS procurements.

2. Nevertheless, the Government Accountability Office (GAO) issued a bid protest decision October 11,

2011, in the case of Aldevra, a SDVOSB, case number B-405271 and B-405524, which recommends VA take corrective action on two acquisitions conducted pursuant to FAR Subpart 8.4, Federal Supply Schedule. The corrective action would require VA to conduct market research to determine if two or more SDVOSBs could perform the work, and, if so, setting-aside the acquisition for SDVOSBs on the open market based on GAO's interpretation of the VAAR, before VA could use the Federal Supply Schedules Program. VA is of the opinion GAO's interpretation is flawed and legally incorrect.

3. The United States Supreme Court ruled in 1986 the Comptroller General is an officer of the Legislative Branch (see Bowsher v. Synar, 478 US. 714, 727-32), holding the Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power. Because GAO is part of the Legislative Branch, Executive Branch agencies are not bound by GAO's legal advice.

4. Therefore, VA determined this GAO recommendation, Aldevra, B-405271 and B-405524, dated October 11, 2011, shall not be followed. We expect this issue ultimately will be decided by the courts. Therefore, VA acquisition and procurement professionals are to continue using the Federal Supply Schedules Program, when necessary and appropriate. The GAO recommendation does not change how VA will acquire goods and services in support of its mission.

5. *Please do not reply to this e-mail message.* Questions regarding this matter should be directed to your respective District Counsel or head of contracting activity. Thank you.

Jan R. Frye
Deputy Assistant Secretary for Acquisition and Logistics

DEPARTMENT OF VETERANS AFFAIRS
NEWS RELEASE

FOR IMMEDIATE RELEASE
October 28, 2011

Statement on VA Veteran-Owned Small Business Contract

"The Department of Veterans Affairs (VA) conducts its contracting with small businesses in good faith and in the spirit of the "Veterans First" legislation that gives preference to eligible Veteran-owned small businesses (VOSBs) and service-disabled Veteran-owned small businesses (SDVOSBs). This law gave VA new authority "for purposes of meeting [its] goals" for contracting with these firms, and VA is complying by exceeding those goals. VA will continue to strongly support eligible Veteran-owned small businesses who seek to do business with the federal government.

It is VA's position that procurement professionals should continue to use the Federal Supply Schedules Program as one of the many contracting vehicles available to meet the needs of the Department. The GAO recommendation does not change how VA will acquire goods and services in support of its mission. VA expects this issue ultimately will be decided by the courts. Since the June 2007 effective date, VA has consistently interpreted the law as a small business set aside program with Veteran small businesses having priority over any other class of small business when conducting full and open competition contracts.

VA again specifically explained that 'this rule does not apply to Federal Supply Schedule task or delivery orders' when promulgating the final rule (74 Federal Register 64619 (December 8, 2009)), implementing the

portions of the Veterans Benefits, Healthcare, and Information Technology Act of 2006 (Public Law 106-491) providing opportunities for SDVOSBs and VOSBs to increase their contracting and subcontracting with VA."

Background

On October 11, 2011, the U.S. Government Accountability Office (GAO) issued a decision upholding a bid protest by an SDVOSB on two solicitations for the purchase of food-preparation equipment. VA has 65 days in which to formally respond to GAO's recommendations, which are currently under review.

VA leads the federal government in contracting with SDVOSBs. In fiscal year (FY) 2010, VA awarded $3.5 billion to VOSBs, of which $3.1 billion went to SDVOSBs, out of a contracting base of $15.4 billion. These awards represent 23% to VOSBs and 20% to SDVOSBs, and greatly exceed VA's goals of 12% and 10%, respectively. This performance also exceeds the government-wide SDVOSB goal of 3%. When VA buyers make purchases through the FSS program, awards to SDVOSBs and VOSBs also count toward these goals—not just awards made through formal set-asides. In FY2010, approximately 12% of VA's total VOSB/SDVOSB spending included firms holding FSS contracts.

VA, in conjunction with the General Services Administration (GSA), encourages VOSBs and SDVOSBs to consider participating in the FSS Program. The FSS Program is the primary vehicle the Federal Government uses in making purchases for commercially available products and services: medically related products and services at VA, and other products and services through GSA. Both agencies' FSS Programs are mul-

tiple award contracting programs that are open for potential new contractors on a continuing basis. The VA and GSA FSS web portals which can assist potential contractors in determining if this program is right for them can be found at http://www.fss.va.gov/ and http://www.gsa.gov/portal/category/100611 respectively.

###

LETTER FROM DENNIS FOLEY TO LYNN H. GIBSON

FEB 16 2012

Ms. Lynn H. Gibson
General Counsel
U.S. Government Accountability Office
441 G. Street
Washington, DC

In Reply Refer To: 025E

In re: B-405727

Dear Ms. Gibson:

The Department of Veterans Affairs (VA) is in receipt of the Government Accountability Office's (GAO) decision and your letter dated on or about December 27, 2011, in the above-subject bid protest case which sustained the bid protest of Kingdomware Technologies on solicitation No. VA-261-11-RQ-1514. GAO's recommendation was as follows:

> RECOMMENDATION
>
> We recommend that the agency conduct reasonable market research regarding its requirements. If as a result of this research the VA determines that there are two or more SDVOSB concerns capable of performing the requirement, the agency should cancel the award and resolicit its requirement as a set aside for SDVOSBs. We also recommend that. the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. §21.8(d)(1) (2011). Kingdomware's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. *Id.* §21.8(f)(1).

Kingdomware Technologies, B-405727, December 19, 2011, B-405524, 2011 CPD ¶ 283.

As this decision is based on GAO's holding in *Aldevra*, B-405271, B-405524, October 11, 2011, 2011 CPD ¶ 183, VA respectfully declines to fellow the Recommendation for the reasons set forth in VA's agency report filed January 4, 2012, in response to protest file number B-406205.

Sincerely,

/s/
Dennis Foley
Deputy Assistant General Counsel (025E)
Department of Veterans Affairs
Office of General Counsel 025
801 Vermont Ave., N.W.
Washington, D.C. 20420
(202) 461-4998 Phone
(202) 273-9384 Fax

cc: Latonya Barton
Kingdomware Technologies

LETTER FROM DENNIS FOLEY TO CHERIE OWEN

APR 12 2012

U.S. Government Accountability Office
*Procurement Law Control Group In Reply Refer To:
441 G Street, N.W.
Washington, D.C. 20548

Attn: Cherie Owen, Esq.

Dear Ms. Owen:

The Department of Veterans Affairs (VA) hereby files this Agency Report in response to the bid protest of Kingdomware Technologies ("Protester"). This matter concerns VA's contract award VA-245-12-F-0622 via an optional use Federal Supply Schedule (FSS) contract for an emergency notification system that will allow communication with VA's anywhere, anytime, via any communication method at the VA Medical Center, Baltimore, MD. (Enclosure). The Protester alleges that the requirement should have been considered and conducted as a set-aside for service-disabled, Veteran-owned small businesses (SDVOSBs) pursuant to 38 U.S.C. 8127-8128, as implemented in VA Acquisition Regulation Part 819. Your file number is B-406507.

VA acknowledges that GAO has previously opined on this specific legal issue in *Aldevra*, B-405271, B-405524, 2011 CPD ¶ 183; *Kingdomware*, B-405727, 2011 CPD ¶ 283; and *Aldevra*, B-406205, 2012 CPD ¶ 112. VA also notes the recent decision in *Alternative Contracting Enterprises, LLC; Pierce First Medical* ("*ACE*"), B-406343, [case numbers omitted], March 26, 2012, which dealt with the application of VA's SDVOSB statute and regulation in relation to the AbilityOne contracting program. In each case, VA made the same argument, that VA had the authority, as the sole im-

plementing agency, to interpret the statute, and in so doing, set forth in the implementing regulation that the SDVOSB/VOSB set-aside program did not impact and was not applicable to either the FSS or the AbilityOne contracting program. GAO distinguishes the two sets of cases in footnote 8 of *ACE* as follows:

> We recognize that we recently found that 38 U.S.C. §8127(d) unambiguously required that the VA set aside procurements for SDVOSB or VOSB concerns where there was a reasonable expectation that two or more such concerns would submit offers and award could be made at a fair and reasonable price. *See Aldevra*, Mar. 14, 2012, 2012 CPD ¶___ at 5; *Kingdomware Technologies*, B-405727, Dec. 19, 2011, 2011 CPD ¶283 at 4; and *Aldevra*, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶183 at 3. The facts in the *Kingdomware* and *Aldevra* cases are inapposite to the current protests because those protests involved the interpretation of the VA Act without reference to other statutory preferences.

VA finds no rational basis for such a distinction since both lines of cases center on the interpretation of VA's statute and legislative history which make no reference to the other authorities. VA acted, as was legally appropriate to do so, by interpreting VA's statute in conjunction with the entire procurement system in notice and comment rulemaking and determined that neither FSS acquisitions nor the AbilityOne program were impacted by VA's SDVOSB/VOSB set-aside authority. VA finds no need to restate the detailed arguments previously filed at GAO. Further, since VA conducted a FSS acquisition, where SDVOSB set-asides are discretionary (see FAR 8.405-5), VA asserts that it is ir-

relevant whether VA conducted market research to determine whether two or more small businesses of any type were capable of bidding on the requirement.

VA finds no legal question at issue in this protest other than Protester's contention that VA is required to perform market research and conduct SDVOSB set-asides, when otherwise appropriate, i.e., Rule of Two, prior to considering use of the FSS. Therefore, with regard to *Aldevra* and its progeny, VA has informed the GAO, and will continue to do so, that VA shall not follow these recommendations. As you are no doubt aware, the Comptroller General is an officer of the legislative Branch. *See Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986) (holding Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power). "Because GAO is part of the legislative Branch, Executive Branch agencies are not bound by GAO's legal advice." Memorandum for the General Counsels of the Executive Branch, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of legal Counsel, *Re: Whether Appropriations May be Used for Informational Video News Releases* at 1 (Mar. 11, 2005) ("Bradbury Memo") (citing *Bowsher*, 478 U.S. at 727-32).

Respectfully,

/s/

Dennis Foley
Deputy Assistant General Counsel

Enclosure

GOVERNMENT ACCOUNTABILITY OFFICE, COMPTROLLER GENERAL OF THE UNITED STATES, DECISION

Matter of: Kingdomware Technologies

File: B-406507

Date: May 30, 2012

* * *

DECISION

Kingdomware Technologies of Waldorf, Maryland, a service-disabled veteran-owned small business (SDVOSB) concern, protests the Department of Veterans Affairs (VA) award of contract No. VA-245-12-F-0622 to Everbridge, Inc. to provide employee emergency notification services.[1] Kingdomware asserts that the agency failed to comply with the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the VA Act), and its implementing regulations, with regard to setting aside procurements for SDVOSB (or veteran-owned small business (VOSB)) concerns.

We sustain the protest.

This procurement was conducted pursuant to General Services Administration Federal Supply Schedule (FSS) procedures, set forth at Federal Acquisition Regulation (FAR) subpart 8.4. Kingdomware asserts that the VA acted improperly by using non-mandatory FSS procedures and awarding a contract to a non-

---

[1] The protester contends that no solicitation number was issued because the agency did not advertise the requirement prior to making the award. Protest at 4. The agency has not disputed this assertion.

SDVOSB company, rather than setting aside the procurement for SDVOSB concerns. Kingdomware further asserts that the agency's own market research established that there were "at least 20 SDVOSB [concerns]" (including Kingdomware) that hold FSS contracts for the acquired services; yet, the agency awarded the contract to a non-SDVOSB concern.

The VA has responded to Kingdomware's protest by repeating arguments it has previously made in connection with a prior protest regarding SDVOSB concerns. See Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112. In that decision we sustained a protest challenging the VA's actions with regard to an FSS procurement in which, as here, the protester asserted that the agency failed to comply with the requirements of the VA Act and its implementing regulations.

Specifically, in Aldevra, we noted that the VA Act provides that:

> ... a contracting officer of [the VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (2006).

There, as here, the VA argued that, notwithstanding the VA Act, the agency need not consider SDVOSB and VOSB set-asides prior to determining whether to purchase goods or services through the FSS program.

We disagreed on the basis that the plain language of the VA Act mandates that the VA "shall" conduct its procurements, including FSS acquisitions, using an SDVOSB set-aside when there is a reasonable expectation that two or more SDVOSB concerns can meet its requirements at a reasonable price. Aldevra, supra, at 5.

Here, the VA asserts that it "finds no legal question at issue in this protest other than [Kingdomware's] contention that VA is required to perform market research and conduct SDVOSB set-asides ... prior to considering use of the FSS." Agency Report, Apr. 12, 2012, at 2. As it has previously, the VA maintains that FSS acquisitions "[are not] impacted by VA's SDVOSB/VOSB authority." Id. Further, the VA does not dispute Kingdomware's assertion that the VA, in fact, conducted market research in connection with this procurement and found that there were at least 20 SDVOSBs that could perform the requirements at issue. Rather, the VA asserts that "it is irrelevant whether VA conducted market research to determine whether two or more small businesses of any type were capable of bidding on the requirement" maintaining that SDVOSB set-asides are discretionary under any FSS acquisition. Id.

For the same reasons we discussed at length in Aldevra, we reject the VA's arguments. In addition, it appears that, here, the agency conducted market research prior to the acquisition and found that at least 20 SDVOSB concerns were capable of meeting the requirements at issue. Specifically, in an email to Kingdomware dated March 12, 2012, the agency stated the FSS schedule under which this procurement was conducted "includes 541 vendors," and acknowledged that "20 of those are SDVOSBs." Protest, Tab 4, Email

from Contract Specialist to Kingdomware, Mar. 12, 2012.

Consistent with our decision in Aldevra, supra, we conclude that the VA Act required the agency to consider whether this acquisition should have been set aside for SDVOSB (or VOSB) concerns. Further, on the record presented, it appears that such set-aside should have occurred. Accordingly, we sustain Kingdomware's protest.

RECOMMENDATION

We recommend that the agency confirm the market research it previously conducted. In the event such research confirms that two or more SDVOSB concerns are able to meet the requirements at a reasonable price, we recommend that the agency cancel the contract to Everbridge and re-solicit the requirement as an SDVOSB set-aside. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2011). Kingdomware's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel

AMENDED COMPLAINT, DATED JUNE 3, 2012 (EXCERPTS)

* * *

NATURE OF THE ACTION

1. Plaintiff brings this action for declaratory and injunctive relief against defendants United States of America, United States Department of Veterans Affairs ("DVA"), and chief executive of that agency, Gen. ERIC K. SHINSEKI in his representative capacity. Plaintiff seeks to compel the DVA to comply with the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§8127 and 8128 ("Veterans First Contracting Program"), by requiring DVA to conduct reasonable market research before proceeding with an acquisition of supplies or services to determine if there is a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States, and if such a determination is made, to set aside the acquisition of the supplies or services for competition limited to veteran owned small businesses.

* * *

THE PARTIES

4. Plaintiff is a Delaware corporation residing in Maryland and is certified as a Service Disabled Veteran Owned Small Business by the DVA.

* * *

STATUTORY AND REGULATORY FRAMEWORK

7. The Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§8127 and 8128 ("Veterans First Contracting Program") require that DVA conduct reasonable market research to determine if there is an expectation that there are at least two veteran owned small businesses that will submit offers on a requirement for supplies or services and that the award can be made to a veteran owned small business at a fair and reasonable price that offers best value to the United States.

8. If a determination is made that there are at least two veteran owned small businesses that will submit offers on a requirement for supplies or services and that the award can be made to a veteran owned small business at a fair and reasonable price that offers best value to the United States, then a contracting officer must set aside the acquisition of the supplies or services for competition limited to veteran owned small businesses. 38 U.S.C. §8127(d). The Veterans First Contracting Program applies only to the acquisition of supplies or services by the DVA.

9. The Federal Acquisition Regulation (FAR), is applicable to all federal agencies, including the DVA. Part 10 requires that an agency conduct market research "to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services," 48 C.F.R. §10.000, prior to soliciting offers for supplies or services. The regulation sets forth procedures for conducting market research. 48 C.F.R. §10.002.

10. The FAR sets forth a priority for the acquisition of supplies and services from or through Govern-

ment supply sources. 48 C.F.R. §8.002. This regulation provides that "[E]xcept ... as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the sources and publications listed below in descending order of priority." The list in order of priority is: agency inventories, excess from other agencies, Federal Prison Industries, Inc., the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled, Wholesale supply sources, such as stock programs of the General Services Administration, Mandatory Federal Supply Schedules, Optional use Federal Supply Schedules; and Commercial sources (including educational and nonprofit institutions).

11. The Veterans First Contracting Program changed the priority of DVA's acquisition of supplies and services. The new priority for the DVA puts awards to service disabled veteran owned small businesses and then veteran owned small business first and second. 38 U.S.C. §§8127(i)(1) and (2) and 8128.

12. The DVA has refused to follow the order of priority established by the Veterans First Contracting Program and is following the order of priority established in FAR Part 8 even when the prerequisites of 38 U.S.C. §8127(d) are met.

13. The DVA continues to satisfy its requirements for supplies and services through use of the GSA's Federal Supply Schedule without first conducting reasonable market research to determine if there are at least two veteran owned small businesses that will submit offers on a requirement for supplies or services and that the award can be made to a veteran owned small business at a fair and reasonable price that offers best value to the United States.

14. The DVA continues to satisfy its requirements for supplies and services through use of the delegation to DVA to use the Federal Supply Schedule for certain medical supplies without first conducting reasonable market research to determine if there are at least two veteran owned small businesses that will submit offers on a requirement for supplies or services and that the award can be made to a veteran owned small business at a fair and reasonable price that offers best value to the United States.

15. The Veterans First statute also establishes a requirement that a business claiming to be a legal Service Disabled Veteran Owned Small Business must be certified as a Service Disabled Veteran Owned Small Business by the DVA and must appear on a database maintained by the DVA before it can be awarded a contract as a Service Disabled Veteran Owned Small Business. 38 U.S.C. §8127(f).

16. The DVA maintains a listing of all businesses which have been certified as Service Disabled Veteran Owned Small Business. 38 U.S.C. §8127(f). This list appears on the DVA website as the Vendor Information Pages (VIP). Found at www.vetbiz.gov.

17. GSA's FSS includes large as well as small businesses. When DVA fulfills its requirements through the use of GSA's FSS when the conditions of 38 U.S.C. §8127(d) are met it irreparably harms veteran owned small businesses because it makes them compete against large businesses and non-veteran owned businesses instead of small veteran owned businesses as intended by Congress.

18. Once an acquisition of supplies or services is satisfied using the FSS that contracting opportunity is

no longer available to veteran owned small businesses until the contract expires.

19. On October 11, 2011, the Government Accountability Office ruled in two bid protests, *Aldevra*, B-405271 and B-405524, that DVA violated the Veterans First Contracting Program and improperly used the FSS rather than setting-aside acquisitions for veteran owned small businesses and recommended that it cancel an award and re-solicit using a SDVOSB set-aside. In the second protest GAO recommended that DVA conduct reasonable market research to determine if there were two SDVOSBs capable of meeting its requirements and, if there were, that DVA re-solicit the requirement using a SDVOSB set-aside.

20. On October 20, 2011 DVA's Deputy Assistant Secretary for Acquisition and Logistics sent an e-mail to all of DVA's acquisition and procurement personnel stating that

> "VA determined this GAO recommendation, Aldevra, B-405271 and B-405524, dated October 11, 2011, shall not be followed. We expect this issue ultimately will be decided by the courts. Therefore, VA acquisition and procurement professionals are to continue using the Federal Supply Schedules Program, when necessary and appropriate. The GAO recommendation does not change how VA will acquire goods and services in support of its mission."

21 On October 28, 2011 DVA issued a press release announcing that it would not follow the recommendations by GAO in the *Aldevra* protests. It directed DVA personnel to continue using GSA's FSS program as they had in the past.

22. The DVA has regularly and routinely awarded contracts for goods and services using the priorities in FAR Part 8 rather than the priorities in the Veterans First Contracting Program.

23. Kingdomware alone has filed at least nine Veterans First protests with GAO alleging that the DVA had violated the provisions of 38 U.S.C. §8127(d). Among these are:

(a) GAO No. 405727 included in this Complaint as Claim for Relief One.

(b) GAO No. 405596—Kingdomware filed a protest with GAO on August 24, 2011 concerning solicitation VA-261-11-RQ-0796 alleging that the DVA had not conducted proper market research to determine if there were at least two SDVOSBs which could be expected to submit reasonable prices to perform the work. The protest recited facts that showed that at least two SDVOSBs had expressed an interest in submitting an offer in response to the solicitation. Despite this, the contracting office did not set the solicitation aside for SDVOSBs. Kingdomware also protested restrictive specifications that called for a competitors's feature.

The DVA responded with a request to dismiss the protest on the basis that DVA was undertaking corrective action that made the protest moot. DVA stated:

> VA has determined that its statement of work may not have been in accordance with the Federal Acquisition Regulation and prior GAO case law. VA will undertake corrective action in the instant protest by creating a requirement that is broadly defined and re-soliciting it. The new solicitation or request for quote will include a

> revised statement of work, and other changes deemed appropriate. In addition, VA will undertake extensive market research to determine the viability of a small business set-aside, with special consideration to a potential Service Disabled Veteran Owned Small Business set-aside.

Based on DVA's promise to take corrective action, GAO dismissed the protest

c) GAO No. 405596.3 Kingdomware filed a second protest on the same work requirement solicited in No. 405596 on October 13, 2011. Instead of taking the corrective action the DVA said it would take in GAO No. 405596, the DVA sought to fulfill its requirements under FAR 8.4, Federal Supply Schedule. Kingdomware also protested that the requirement should be set-aside for SDVOSB participation.

This protest was dismissed by GAO based on a new promise by the DVA to grant corrective action that would satisfy Kingdomware's request in the second protest on this requirement. The GAO decision dated November 28, 2011 stated:

> Subsequent to the filing of this protest, the agency notified our Office of its intent to directly request a quote from Kingdomware using Federal Acquisition Regulation (FAR) part 8.4 procedures, which granted the relief requested and rendered the protest academic. Specifically, the agency will request a new quote to include a revised statement of work and other changes deemed appropriate.

Kingdomware filed a third protest concerning this requirement on December 15, 2011 alleging that DVA

did not request a quote from Kingdomware using the FAR Part 8.4 procedures as it promised in getting the earlier protest dismissed.

d) GAO No. 405797.1—Kingdomware filed a protest with GAO on September 23, 2011 concerning solicitation Ebuy RFQ624196 FY 12 Live Process Subscription. Kingdomware protested that the solicitation was being conducted as a sole source award even though Kingdomware provides the same services as Live Process. Kingdomware also protested that DVA did not perform proper market research to see if the acquisition should be set-aside for SDVOSBs. On October 21, 2011 the solicitation was cancelled. Kingdomware sent an e-mail to the contracting officer and DVA attorney stating:

> Kingdomware Technologies and SDV Security LLC are two independent Service Disabled Veteran Owned Businesses (SDVOSBs) certified by the Department of Veteran's Affairs (VA). We both provide mass notification, incident management and document storage systems and services. Both of our companies are very interested in the DVA opportunity that was listed as a Live Process Subscription. Live Process is a competitor to each of our companies.

Because DVA stated that the solicitation would be cancelled the protest was dismissed.

(e) GAO 406633.2—Is a sequel to GAO 405797.1. It was filed on April 16, 2012. Both Kingdomware and a competitor, SDV Security, which is also a verified SDVOSB, filed protests with GAO over the earlier solicitation in 405797.1 and 495797,2. Therefore, the DVA was aware that there were two SDVOSBs

that were interested in the requirement when the solicitation was issued. Kingdomware alleged that DVA violated the Veterans First Contracting Program, 38 U.S.C. §§ 8127 and 8128, because it did not set the requirement aside for competition limited to SDVOSBs. The protest also alleged that the DVA used a statement of work prepared by a competitor, Live Process.

(f) GAO 406010—Kingdomware filed a protest with GAO on October 14, 2011 concerning an award made on October 5, 2011. The award was made as an Agency Task Order against a GSA Schedule contract for Emergency Notification Services to be provided to Overton Brooks DVA Medical Center. The protest alleged that the DVA had failed to conduct market research to determine if there were two or more SDVOSBs who could be expected to submit a bid or offer for the work at a reasonable price in violation of 38 U.S.C. §8127 and 8128. Further, if the market research disclosed there were two or more SDVOSBs, then the DVA violated the mandatory SDVOSB set-aside required by 38 U.S.C. §8127(d).

The protest was dismissed because Kingdomware did not establish that the protest was timely filed with GAO.

(g) GAO 406228— included in this Complaint as Claim for Relief Two,

(h) GAO 406507 included in this Complaint as Claim for Relief Three.

24. By continuing to award contracts using the priorities in FAR Part 8 rather than the preferences in the Veterans First Contracting Program Defendants United States, DVA, and Eric K. Shinseki are in viola-

tion of the Veterans First Contracting Program, 38 U.S.C. §8127(d) and §8128.

25. By refusing to conduct reasonable market research before proceeding with an acquisition of supplies or services to determine if there is a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States, Defendants are in violation of 38 U.S.C. §§8127 and 8128 and FAR Part 10, 48 C.F.R §10.000 *et seq.*

* * *

PARTIES' JOINT STIPULATION OF FACTS, SEPT. 4, 2012

Pursuant to the Court's scheduling order of August 21, 2012, the parties respectfully submit the "Parties' Joint Stipulation of Facts" relating to one of the three procurements identified in plaintiff's amended complaint.[1] The stipulated facts below relate to Department of Veterans Affairs (VA) award of contract No. VA-245-12-F-0622, which is included in plaintiff's amended complaint as the third claim for relief. Am. Compl. at 14-16. Plaintiff also protested this award to the Government Accountability Office (GAO), and GAO issued Comptroller General Decision B-406507, dated May 30, 2012.

FACTS

1. In approximately January 2012, the VA determined that it needed to procure an Emergency Notification Service (ENS) for the Veterans Integrated Service Network 5, a grouping of four VA medical centers and associated outpatient clinics.

2. The purpose of an ENS is to rapidly deliver messages to VA personnel with critical information and notices in an emergency situation, such as a natural disaster. The proposed contract was intended to provide ENS services only until a VA-wide notification system is implemented, which is anticipated to occur during fiscal year 2012.

3. The contracting officer decided to satisfy the VA's requirements under Federal Acquisition Regulation (FAR) subpart 8.4 using the General Services Administration Federal Supply Schedule (FSS).

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[1] "Amended Complaint" refers to plaintiff's amended complaint filed July 18, 2012.

4. The VA contract officer conducted market research and identified three possible sources for the ENS. However, the contracting officer determined that none of the three possible sources could meet the VA's requirements. Thus, a limited source FSS justification was conducted in accordance with FAR 8.405-6.

5. On or about February 14, 2012, the contracting officer sent Request for Quote (RFQ) VA245-12-Q-0078 to FSS vendor, Everbridge Inc. (Everbridge), to solicit a quote for ENS services.

6. Everbridge submitted a quote of $33,824.10 for the base year of March 1, 2012 through February 28, 2013; $33,824.10 for option year 1, if exercised, and $33,824.10 for option year 2, if exercised.

7. On or about February 22, 2012, after the having determined that Everbridge offered a fair and reasonable price, the contracting officer awarded a task order contract to Everbridge pursuant to its FSS BPA (VA245-BP-0139) for the base year at $33,824.10, and a total amount of $101,472.30 if both option years were exercised.

8. The contracting officer then posted the contract award to the Federal Procurement Data System-Next Generation reporting system, which included basic information on this contracting action including the contracting activity, the awardee, the contract term, and dollar amount of the award.

9. On March 14, 2012, plaintiff Kingdomware Technologies, Inc. (Kingdomware) filed a bid protest with the GAO objecting to the award on the basis that the VA allegedly had not complied with the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (2006) (the 2006 Act).

10. After briefing from both parties, on May 30, 2012, the GAO issued a decision sustaining the protest.

11. On or about August 8, 2012, VA responded to the GAO and Kingdomware that VA would decline to follow the GAO recommendations in GAO's decision in B-406507.

Respectfully Submitted,

STUART F. DELERY
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/ Patricia M. McCarthy
PATRICIA M. MCCARTHY
Assistant Director

s/ Robert C. Bigler
ROBERT C. BIGLER
Trial Attorney
Commercial Litigation Branch
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Attorneys for Defendant

s/ Timothy H. Power
TIMOTHY H. POWER
327 First Street West
Apt. 1
Sonoma, CA 95476
Telephone: (707)938-7183
Attorney for Plaintiff

September 4, 2012

LETTER FROM ANDREA M. GARDNER-INCE TO TIMOTHY BARTON

SEP 0 5 2012

Mr. Timothy Barton
Kingdomware Technologies, Inc.
DUNS # 848528105
11186 Bel Aire Court
Waldorf, MD 20603

In Reply Refer To: OOVE

Dear Mr. Barton:

On behalf of the U.S. Department of Veterans Affairs (VA), Center for Veterans Enterprise (CVE), I am writing to inform you that your service-disabled Veteran-owned small business (SDVOSB) has been verified and added to the Veteran business database at www.vip.vetbiz.gov.

Kingdomware Technologies, Inc., will be eligible to participate in Veterans First Contracting Program opportunities with VA. This verification is valid for up to two years from the date of this letter.

To promote your verified status, you may use the following logo link to download the logo for use on your marketing materials and business cards:

http://www.vetbiz.gov/cve_completed_s.jpg

To ensure that your business is correctly listed in the Vendor Information Pages, check your profile for the verified logo. Please notify us if the logo is not present within 72 hours of receipt of this letter.

Thank you for your service to our country and for continuing to serve America through small business ownership.

Respectfully,

/s/

Andrea M. Gardner-Ince
Center for Veterans Enterprise

**PARTIES' JOINT STATUS REPORT,
DEC. 10, 2012**

Pursuant to the Court's opinion and order, dated November 27, 2012, the parties respectfully submit this status report as to the next steps in this litigation and whether the parties would like the Court to direct entry of judgment in this matter. The parties have discussed the Court's opinion and both parties agree and hereby respectfully request that the Court enter judgment for the Government as to all three of the procurements identified in plaintiff's amended complaint for the reasons stated in the Court's opinion, dated November 27, 2012.

Respectfully Submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General

JEANNE E. DAVIDSON
Director

s/ Timothy H. Power
TIMOTHY H. POWER
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Apt. 1
Sonoma, CA 95476
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Attorney for Plaintiff

s/ Patricia M. McCarthy
PATRICIA M. MCCARTHY
Assistant Director

s/ Robert C. Bigler
ROBERT C. BIGLER
Trial Attorney
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Civil Division
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Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-0315

December 10, 2012

Attorneys for Defendant

ORDER FOR ENTRY OF JUDGMENT, DEC. 12, 2012

Based on the parties' joint status report, filed December 10, 2012, in which the parties request that the court, for the reasons identified in the November 27, 2012 opinion (ECF No. 30), enter judgment for defendant as to all three of the procurements identified in plaintiff's amended complaint. Accordingly, the Clerk of the Court is directed to enter judgment for defendant under Rule 54(b) of the Rules of the United States Court of Claim. Each party shall bear its own costs.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

GOVERNMENT ACCOUNTABILITY OFFICE, COMPTROLLER GENERAL OF THE UNITED STATES, DECISION

Matter of: Kingdomware Technologies

File: B-406507

Date: December 13, 2012

* * *

DECISION

Kingdomware Technologies, of Waldorf, Maryland, a service-disabled veteran-owned small business (SDVOSB), requests reconsideration of our decision in Kingdomware Technologies, B-407232, Sept. 17, 2012, in which we dismissed a protest challenging the award of task order No. VA255P657SC1615, and the exercise of an option under that task order, by the Department of Veterans Affairs (VA) to LiveProcess, Inc., of Madison, New Jersey, under that firm's Federal Supply Schedule (FSS) contract.

We dismiss the request because, as discussed below, our Office will no longer consider protests concerning the contention that the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VA Act), 38 U.S.C. §§ 8127-28 (2006), requires the VA to consider setting aside a procurement for SDVOSBs, or veteran-owned small businesses (VOSB), before procuring its requirements under the FSS.

On August 1, 2011, the VA issued the task order on a sole-source basis under LiveProcess' FSS contract. The VA posted information concerning the task order on the Federal Procurement Data System (FPDS)

website the same day.[1] One year later, on August 1, 2012, the VA exercised an option to extend the task order, and posted the information on FPDS on August 2. The VA did not post the task order award or exercise of the option on the Federal Business Opportunities (FedBizOpps) website. On August 18, Kingdomware became aware of the information on FPDS, and on August 27 protested to our Office both the 2011 award, and the 2012 exercise of the option.

Kingdomware argued that the VA's award of the initial task order, and its exercise of the task order option one year later, did not comply with the requirements of the 2006 VA Act. Kingdomware cited our Office's decision in Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183, where we held that the plain meaning of 38 U.S.C. § 8127(d) requires the VA to conduct market research concerning its requirements and determine whether there are two or more SDVOSBs (or VOSBs) capable of performing the requirements, and if so, to set the requirement aside exclusively for SDVOSB (or VOSB) concerns. Specifically, our Office held in Aldevra that the VA must consider whether to set aside the procurement for SDVOSBs (or VOSBs) prior to conducting a procurement on an unrestricted basis under the FSS.

On September 17, our Office dismissed Kingdomware's protest. We dismissed the challenge to the underlying task order award and failure to post the award on the FedBizOpps website, concluding that, given passage of more than one year since the award of the order, "no

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[1] FPDS is a publicly available database of information about executive agency contract actions above the micro-purchase threshold, located at https://www.fpds.gov. Federal Acquisition Regulation §§ 4.602, 4.603.

useful purpose is served by our considering a protest of the action." Kingdomware Techs., supra, at 2. We also dismissed the challenge to the exercise of the option on the task order because our Office will generally not question an agency's exercise of an option contained in an existing contract, unless the protester shows that the agency failed to follow applicable regulations, or the agency's determination to exercise the option, rather than conduct a new procurement, was unreasonable. Id. at 2-3.

Kingdomware requests reconsideration of our decision. This request is based, at its core, on a contention that the 2006 VA Act requires the VA to consider a set-aside for SDVOSBs (or VOSBs) prior to conducting an unrestricted procurement under the FSS. Recent actions by the VA and the U.S. Court of Federal Claims lead our Office to conclude that we should not continue hearing protests that rely solely on this contention.

In response to our Office's decision in Aldevra and other decisions regarding the 2006 VA Act,[2] the VA has advised that it will not follow our recommendations concerning our interpretation of the 2006 VA Act. See GAO Annual Report to Congress for Fiscal Year 2012, at 1, available at: http://www.gao.gov/products/GAO-13-162SP. Additionally, on November 27, the U.S. Court of Federal Claims issued a decision which disagreed with our Office's interpretation of the 2006 VA Act. Kingdomware Techs., Inc. v. United States, No. 12-173C (Fed. Cl., Nov. 27, 2012). The court held that the VA's interpretation of the 2006 VA Act and its reg-

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[2] E.g., Kingdomware Techs., B-405727, Dec. 19, 2011, 2011 CPD ¶ 283; Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ 112; Crosstown Courier Serv., Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ 119.

ulations, which permit the VA to place orders on the FSS without first considering whether to set aside a requirement for SDVOSB (or VOSB) firms, was entitled to deference. Id. at 34, 35.

While this Office has set forth its view of the 2006 VA Act in Aldevra and its progeny, as well as in testimony before the Congress,[3] the VA has elected not to follow our recommendations. In addition, the court has reached a different conclusion about the meaning of the 2006 VA Act. Although our Office is not bound by the court's decisions, its decision in Kingdomware, together with the VA's position on the meaning of this statute, effectively means that protesters who continue to pursue these arguments will be unable to obtain meaningful relief. Consequently, under these circumstances, we will no longer consider protests based only on the argument that the VA must consider setting aside procurements for SDVOSBs (or VOSBs) before conducting an unrestricted procurement under the FSS.

The request for reconsideration is dismissed.

Susan A. Poling
General Counsel

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[3] Veterans Administration Procurement: Protests Concerning Service-Disabled Veteran-Owned Small Business Preferences Sustained, GAO-12-278T (Nov. 2011).

LETTER FROM ROBERT C. BIGLER TO FEDERAL CIRCUIT

March 18, 2014

BY ECF

The Honorable Daniel E. O'Toole
Clerk of the Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: *Kingdomware v. United States*, 2013-5042

Dear Mr. O'Toole:

As requested by the Court during oral argument, enclosed is an appendix which includes the veteran-owned small business contracting goals set by the Department of Veterans Affairs (VA) for fiscal years 2006 through 2013. We have also enclosed, as requested by the Court, the percentages achieved by VA for awards to veteran-owned small businesses for FY2006 through FY2012. The results for FY2013 have not yet been finalized.

The Veterans Benefits, Health, Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-28 (the 2006 Act) became effective 180 days after its enactment on December 22, 2006. Pub. L. 109-461, Title V, § 502(d). Thus, the 2006 Act became effective towards the end of FY 2007 in June 2007. As a result, the 2006 Act was not fully implemented until FY2008.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

ROBERT E. KIRSCH-
MAN, JR.
Director

/s/ Patricia M. McCarthy
PATRICIA M.
MCCARTHYAssistant
Director

/s/ Robert C. Bigler
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Enclosure

APPENDIX*

* Table of contents from original document omitted.

May 11, 2006

MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS, DEPUTY ASSISTANT SECRETARIES, AND FIELD FACILITY DIRECTORS

SUBJECT: Department-wide Small Business Program Goals for FY 2006 and FY 2007

President George W. Bush and I recognize and respect the value of small business to our Government and way of life. The President has set forth an aggressive small business agenda that contains many important initiatives to assist and sustain small business in its contributions to a robust American economy. Under this. Administration, the Department of Veterans Affairs (VA) is committed to supporting the growth and prosperity of small business. Make no mistake about it, small business is the great engine that drives America's economy. As the saying goes, "*The business of the American People is business.*"

Small business represents 99 percent of all employers, employing more than half of the Nation's private sector workforce. Small business creates three of every four new jobs and generates the majority of American inventions and innovations. It also accounts for more than 50 percent of the Nation's Gross Domestic Product. Entrepreneurship has become the path to prosperity for many Americans, including service-disabled veterans, veterans, women, and minorities.

I am keenly aware of the accomplishments and importance of small businesses to VA in providing optimum service to America's veterans. Small business sustains VA's business-serving America's veterans and their families. Small business is our partner in provid-

ing the services and supplies that underwrite our network of care. Small business helps us fulfill our mission *"to care for him who shall have borne the battle, and his widow and his orphan."* When VA partners with small business, we serve not only veterans, but the community-at-large, and in a greater sense, the country-at-large. We become an agent for economic growth by contributing to local communities and position ourselves to create a more wide-reaching and effective VA.

Maximizing opportunities for veteran-owned and service-disabled veteran-owned small businesses is a priority and must continue in FYs 2006 and 2007. Doing business with these firms is a logical extension of VA's mission: spending our acquisition dollars with the very individuals we are charged with serving.

As the chief advocate for veterans at the Federal level, veteran-owned and service-disabled veteran-owned small businesses look to VA to be the leader in these two important socioeconomic categories. Deputy Secretary Mansfield and I are committed to VA becoming the Federal leader in these categories.

Goals for this and next fiscal year are based on total procurement dollars spent and are shown below. I believe these goals are more realistic than the "stretch goals" proposed in recent years. They take into consideration the realities and competing interests faced by VA acquisition professionals, program managers and officials in carrying out our mission. By setting more realistic goals, we establish goals that are both meaningful and attainable, yet challenging as we work to serve our Nation's veterans:

Small Business	25%

In addition, specific goals based upon total procurement dollars have been established for the following categories of small businesses:

Small Disadvantaged Business (includes Section 8(a))	9%
Women-Owned Small Business	5%
Service-Disabled Veteran-Owned Small Business	3%
Historically Underutilized Business (HUB) Zone Small Business	3.05%
Veteran-Owned Small Business	7%

Every Secretary of Veterans Affairs has recognized the socioeconomic accomplishments of its contracting activities for surpassing the Secretary's goals. I am proud to continue the Secretary's Socioeconomic Achievement Awards Program and challenge every VA contracting activity to commit to becoming an award recipient for their FY 2006 and 2007 accomplishments.

/s/
R. James Nicholson

January 28, 2008

MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS, DEPUTY ASSISTANT SECRETARIES, AND FIELD FACILITY DIRECTORS

SUBJECT: Department-wide Small Business Program Goals for Fiscal Year (FY) 2008 and FY 2009

Below are the FY 2008 and FY 2009 Small Business Program Goals. Goals for this and next fiscal year are based on total procurement dollars spent and are shown below. These goals are realistic, attainable and take into consideration the realities and competing interests faced by VA acquisition professionals, program managers, and officials in carrying out our mission.

Department-wide Small Business Program Goals for FY 2008 and FY 2009

Small Business	28.7%

In addition, specific goals based upon total procurement dollars have been established for the following subcategories of small business:

Service-Disabled Veteran-Owned Small Business	7%
Veteran-Owned Small Business	10%
Small Disadvantaged Business (includes Section 8(a))	5%
Historically Underutilized Business (HUB) Zone Small Business	3%
Women-Owned Small Business	5%

The service-disabled veteran-owned small business and the veteran-owned small business goal are established pursuant to Section 8127(a) of 38 U.S.C., and are

applicable to Department of Veterans Affairs (VA) prime contract awards and subcontracts awarded by large business VA prime contractors.

The Department has a long history of supporting small business programs in serving our Nation's veterans. I am proud to lend my support to ensuring maximum practicable opportunities exist in VA acquisitions for small businesses, especially those owned by veterans. Not only is contracting with veteran-owned small businesses a natural extension of the Department's mission, it is good business to spend VA's acquisition dollars to create economic opportunities within the very community we are charged with serving.

In FY 2007, VA exceeded both the service-disabled veteran-owned and veteran-owned small business goals, making VA the clear leader in the Federal community in contracting with veteran entrepreneurs. Although we can all be proud of these important accomplishments, we must continue our efforts to improve upon them. Our FY 2008 and FY 2009 goals strengthen VA's commitment to veteran entrepreneurs and will further challenge and motivate VA's dedicated workforce. Deputy Secretary Gordon H. Mansfield and I are personally committed to ensuring VA remains the Federal leader in contracting with veteran entrepreneurs.

Thank you for your continued support of small businesses and veteran entrepreneurs.

/s/
James B. Peake, M.D.

May 7, 2010

MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS, DEPUTY ASSISTANT SECRETARIES, AND FIELD DIRECTORS

SUBJECT: Fiscal Year (FY) 2010 and FY 2011 Department-wide Small Business Program Goals

The Department of Veterans Affairs (VA) has a long history of supporting small business programs. I am proud to lend my support to ensuring that maximum practicable opportunities exist in VA acquisitions for small businesses, especially those owned by Veterans. Contracting with Veteran-owned small business is a natural extension of the Department's mission. It is good business to spend VA's acquisition dollars to create economic opportunities within the very community we are charged with serving. I am proud that VA was the leader among all Federal agencies in prime contract awards to Service Disabled Veteran Owned and Veteran Owned Small Businesses in FY 2009. VA needs to also be the leader in subcontracting accomplishments.

During my speech at the 5th Annual National Veterans Small Business Conference, I recognized that VA has not done well in regard to subcontracting achievements and stated that this is going to change. I believe our FY 2010 and FY 2011 prime and subcontracting goals reflect VA's strong commitment to small business and Veteran entrepreneurs. While these goals are challenging, they are also realistic, attainable, and take into consideration the realities and competing interests faced by VA acquisition professionals and program officials in carrying out our mission, which includes compliance with all applicable laws and regulations related to contract awards.

Goals for FY 2010 and FY 2011 are based upon total procurement dollars expended. The prime contracting goals are as follows:

Small Business	33.5%
Veteran Owned Small Business	12.0%
Service Disabled Veteran Owned Small Business	10.0%
Small Disadvantaged Businesses (includes Section 8(a))	5.0%
Woman-Owned Small Business	5.0%
Historically Underutilized Business (HUB) Zone Small Business	3.0%

Subcontracting goals for FY 2010 and FY 2011 are as follows:

Small Business	17.7%
Veteran Owned Small Business	5.0%
Service Disabled Veteran Owned Small Business	3.0%
Small Disadvantaged Businesses (includes Section 8(a))	5.0%
Woman-Owned Small Business	5.0%
Historically Underutilized Business (HUB) Zone Small Business	3.0%

During the coming years, I will recognize outstanding performance by contracting facilities across VA by continuing the Secretary's Socioeconomic Achievement Awards Program. Thank you for your continued support of small business and Veteran entrepreneurs.

/s/
Eric K. Shinseki

February 21, 2012

MEMORANDUM FOR UNDER SECRETARIES, ASSISTANT SECRETARIES, OTHER KEY OFFICIALS, DEPUTY ASSISTANT SECRETARIES, HEADS OF CONTRACTING ACTIVITY, AND FIELD DIRECTORS

SUBJECT: Fiscal Year (FY) 2010 and FY 2011 Department-wide Small Business Program Goals

The Department of Veterans Affairs (VA) continues to lead the Federal government in contracting with small businesses, especially service-disabled and other Veteran-owned small businesses. With the fourth largest procurement budget, amounting to over $16 billion in FY 2010, VA out-paced every other civilian agency in contract dollars awarded to small businesses. I am grateful to you and to VA's acquisition professionals and program managers for recognizing the value small business brings in supplying our contracting requirements, and for once again earning an "A" on the Small Business Administration's 2010 Small Business Procurement Scorecard.

We must continue to build on that success, and do so in a challenging budget environment. Small businesses employ about half of America's workforce, and created 65% percent of net new jobs between 1993 and 2009. Small businesses are a vital part of our nation's economic recovery. Small business entrepreneurship provides a key option for Veterans seeking to reintegrate into our nation's domestic life after honorable military service. When VA spends its contracting dollars with small businesses, we not only purchase the goods and services we need to serve Veterans directly, we leverage that spending to support Veterans in America's competitive marketplace.

Accordingly, I am establishing VA's Department-wide small business goals for FY 2012 and FY 2013, as set forth below. These goals are based upon VA's total procurement dollars expended. I am also directing the Acting Chief Acquisition Officer (CAO) and the Executive Director, Small and Veteran Business Programs, in collaboration with the Heads of Contracting Activity (HCA), to lead a task force to develop comparable goals for the Administrations and Staff Offices with procurement authority.

Further, the task force will develop systems for monitoring and managing progress toward these goals. I expect the Acting CAO and the Executive Director to closely monitor VA's performance in this area, and I expect the HCAs to aggressively manage performance in contracting activities under their purview. I look forward to receiving the task force's recommendations. However, the need to focus our procurement efforts on meeting the FY 2012 goals begins immediately. The Executive Director will provide me with a detailed quarterly report, in addition to summary reports provided as part of the Monthly Performance Review process.

Prime Contracting Goals

Small Business	34.0%
Veteran-Owned Small Business	12.0%
Service-Disabled Veteran-Owned Small Business	10.0%
Small Disadvantaged Businesses (including Section 8(a))	5.0%
Women-Owned Small Business	5.0%
Historically Underutilized Business Zone (HUBZone) Small Business	3.0%

Subcontracting Goals

Small Business	17.5%
Veteran-Owned Small Business	5.0%
Service-Disabled Veteran-Owned Small Business	3.0%
Small Disadvantaged Businesses (including Section 8(a))	5.0%
Women-Owned Small Business	5.0%
Historically Underutilized Business Zone (HUBZone) Small Business	3.0%

These are ambitious goals for VA. They are achievable only with our concerted efforts to provide opportunities for small businesses and add value to the mission of VA. I will continue to recognize outstanding small business achievements through the Secretary's Socioeconomic Achievement Awards Program. Thank you for your continued support of small businesses, Veteran entrepreneurs, and Veterans.

/s/
Eric K. Shinseki

Department of Veterans Affairs Small Business Goaling Numbers
Fiscal Year 2006 Through Fiscal Year 2012

Funding Department	Total Small Business Eligible Actions	Total Small Business Eligible Dollars	Small Business Percentage	Veteran Owned Small Business Actions	Veteran Owned Small Business Dollars	Veteran Owned Small Business Percentage	Service Disabled Veteran Owned Small Business Actions	Service Disabled Veteran Owned Small Business Dollars	Service Disabled Veteran Owned Small Business Percentage
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2006	2,887,894	$9,972,594,538.87	28.7077%	290,127	$616,294,696.49	6.1799%	41,970	$356,206,175.56	3.5719%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2007	3,943,523	$11,735,408,740.83	32.8466%	399,541	$1,216,580,370.73	10.3667%	51,304	$831,811,813.84	7.0881%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2008	2,939,134	$14,100,026,740.41	35.1568%	396,340	$2,099,307,288.37	14.8887%	161,372	$1,661,424,970.69	11.7831%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2009	230,253	$14,545,213,660.26	34.9418%	29,412	$2,905,861,620.63	19.9781%	18,924	$2,466,320,013.65	16.9562%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2010a	473,523	$16,039,864,961.02	37.3469%	34,694	$3,701,396,706.47	23.0762%	24,490	$3,215,644,534.22	20.0478%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2011	1,351,641	$17,564,879,551.80	33.6639%	36,641	$3,601,045,194.22	20.5014%	24,623	$3,200,437,617.67	18.2207%
VETERANS AFFAIRS, DEPARTMENT OF (3600) FY 2012	1,901,975	$17,520,631,014.19	35.0093%	107,091	$3,813,442,163.54	21.7654%	23,097	$3,371,804,926.75	19.2448%

LETTER FROM LAUREN B. FLETCHER TO FEDERAL CIRCUIT

April 2, 2014

BY ECF

The Honorable Daniel E. O'Toole
Clerk of the Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: *Kingdomware v. United States*, 2013-5042

Dear Mr. O'Toole:

On March 18, 2014, Appellee submitted an appendix regarding the Department of Veterans Affairs' ("VA") annual goals for contracting with veteran-owned small businesses, as well as the percentages VA has achieved for awards made to veteran-owned small business for FY2006-FY2012.

Appellee's submission does not identify the source of the data, nor does it explain the criteria for each of the categories identified in the chart providing percentages VA has achieved for awards made to veteran-owned small businesses. Indeed, the chart appears to have been created specifically in response to the Court's request in this litigation. Moreover, no evidence in the record indicates that VA contracting officers are relying on this type of data in making their contracting decisions. *See* A170-A172, Stipulated Facts (making no reference to assessing whether the acquisition should be used to meet the goals; instead stating at A171, "The contracting officer decided to satisfy the VA's requirements under Federal Acquisition Regulation (FAR) subpart 8.4 using the General Services Administration

Federal Supply Schedule (FSS)."); A67, 10/17/2011 E-mail from Deputy Assistant Secretary for Acquisition and Logistics to All VA Acquisition and Procurement Officials/Personnel (instructing VA contracting officers to continue ordering from the FSS, without instructing that VA's progress toward its contracting goals should be considered); 48 C.F.R. § 819.7005 (VA regulation mandating that contracting officers shall set aside procurements for SDVOSBs when the Rule of Two is met and making no reference to goals); 48 C.F.R. § 819.7006 (same for VOSB).

Respectfully submitted,

/s/ Lauren B. Fletcher

Lauren B. Fletcher